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October Term, 1949

No. 24

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STEPHEN J. ROTH, Attorney General of the State of Michigan, etc.,

Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, et al.,

Appellees.

Appeal from the United States Court of Appeals For the Sixth Circuit

Reply Brief for Appellant

STEPHEN J. ROTH
Attorney General of Michigan

EDMUND E. SHEPHERD
Solicitor General of Michigan

ARCHIE C. FRASER
Assistant Attorney General of Michigan

State Capitol,
Lansing 2, Michigan

JULIUS H. AMBERG
Special Assistant Attorney General of Michigan
500 Michigan Trust Building
Grand Rapids 2, Michigan

Counsel for Appellant

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Reply Brief for Appellant

I.

Questions Eliminated

The able brief of appellee has dropped certain claims of his former counsel. It is no longer asserted that the United States District Court did not have jurisdiction over the subject matter, which was the first point in appellee's motion to dismiss the case in that Court (R. 48). Neither is it further claimed that this suit was disposed of by a

settlement agreement of a prior suit, not here pleaded, not in the record and not effecting settlement of the matters involved in the present suit in any event. Nor is it asserted that the Michigan Escheat Law lacks any features required by due process. Furthermore, it is admitted that the saving clause in the new Michigan Code of Escheats, which repealed the law under which this suit was brought, keeps this suit from being moot. Hence, the matters presented in our original brief (I.C., pp. 28-30; I.D., p. 31; III.D, p. 44; IV.A, p. 46) are, in effect, conceded. Likewise, appellee points out no errors in our statement of the case. He does mention some additional facts from an affidavit filed in the District Court in support of the motion to dismiss. So far as material we shall discuss these under the headings to which they apply.

II.

Jurisdiction

The appellee admits on the authority of *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185-186, that what the appellee may have raised in his pleadings is immaterial if the lower court in fact passed upon the validity of the Michigan statute. Hence, we have no problem as to whether the validity was "drawn in question", a matter immaterial anyway under the present statute in appeals from courts of appeal (see our original brief, pp. 25-28).

Appellee, nevertheless, refers to his position in the lower court. He contends that this was "that the state statute does not apply because the National Bank Act provides a complete and exclusive system for the winding up of the affairs of an insolvent national bank". As a matter of fact, appellee phrased his position below as being that the Michigan law was an "invalid intrusion" on the Federal

statute, but this is immaterial. The way appellee now sets forth his contention in the Court below, as above quoted, shows that his contention was, that the Michigan statute was invalid. His contention as now phrased was not that the Michigan statute if properly construed would not "apply" to national banks in liquidation, but that it could not validly be applied because of its alleged interference with the Federal statute. This brings the case squarely within appellate jurisdiction of this Court, under *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, and the other cases cited in our original brief, pp. 26-27, which cases appellee does not controvert.

In support of the contention that this case involved only "applicability" and not "invalidity" of the Michigan statute, appellee refers to what he designates the main prayer of appellant's petition, below, viz., that the Michigan law be determined to be applicable to the bank in liquidation. This was merely one of the prayers. Another was (R.14) "that the defendants . . . are subject to and bound by the provisions of the foregoing laws (Michigan Escheat Laws)".

Appellee's only attempt to avoid the holding of the court below (R.68) that the Michigan Escheats Law constitutes "an unlawful interference with the liquidation of a national bank" is to the effect that this did not hold the Michigan law unconstitutional and therefore it was not held "to be invalid as repugnant to the Constitution". (28 U.S.C. 1254(2)). But Sec. 1254(2) is, of course, not so restricted. Appellate jurisdiction lies thereunder if a state statute is held invalid as repugnant merely to the *laws* of the United States. There was no question in the case concerning the Constitution as such. Of course, under the Constitution the United States had the right to create national banks as Federal instrumentalities and the National Bank Law

under the Constitution is supreme in the field it covers. The court below held the Michigan statute unlawfully interfered with the National Bank Act. The problem is one of alleged clash between state and federal laws, and this is sufficient for the appellate jurisdiction of this Court under Sec. 1254(2).

As to decisional law, appellee relies on *Gamble v. Daniel*, 281 U.S. 705, and *Reeves v. Williamson*, 317 U.S. 593, referred to in our original brief, p. 27. These were cases where this Court dismissed the appeal without full opinion. They were not cases of clear clash between state and federal laws as where appeals similar to the present one were allowed in *Madden v. Kentucky*, 309 U.S. 83 and *R.F.C. v. Beaver County*, 328 U.S. 204, the latter containing a full discussion squarely in point.

Phillips v. United States, 312 U.S. 246, relied on by appellee, involved not the invalidity of a state statute but the action of the state governor in calling out the militia, and of course was not within the appellate jurisdiction of this Court.

Nor does appellee gain any thing by contending that there was here involved merely the method of applying the Michigan statute rather than the statute itself. Of course, if the matter is merely one of administration under a statute rather than the statute, as in *Charleston Ass'n v. Alderson*, 324 U.S. 182, then the "statute" has not been held invalid. In the *Alderson* case, a state tax assessment statute was valid but was claimed to have been administratively applied in a discriminatory manner against the appellant. This is not what happened in the present case. The only administrative action of the State of Michigan was the action of the Attorney General in seeking a judg-

ment that the Michigan Escheats Statute was binding upon the bank in liquidation and on the receiver. Thus the validity of the law itself was placed squarely in issue and this was the only point at issue on this branch of the case.

But appellee seeks to show from a reference in the decision below to the former decision in *Rushton v. Schram*, 143 F. 2d 554, (R.67) that the Court in the present case was relying on the supposed non-retroactivity of the Michigan law. The majority of the Court did so rely in this former decision as to "*dormant*" deposits, that is to say, where no one had proved a claim thereto. But no one has contended and appellee does not now contend, in light of *Cox v. Hart*, 260 U.S. 427, and the more recent cases cited by us on p. 23 of our original brief, that there would be a retroactive application of the Michigan law as to proven claims by including in the abandonment period time which had elapsed prior to the enactment of the law.

Counsel think it unlikely, as we suggested in our original brief, p. 23, that the majority of the Court in *Rushton v. Schram, supra,* came around to the view of Judge Simons in the unanimous decision in *Starr v. Schram,* 143 F. 2d 561, and this because it was decided the same day. But we are not merely making a suggestion. The Court in the instant case (R.67) itself states that this was the case, "In Starr, Attorney General, v. Schram, Sixth Cir., 143 F. 2d 561 (decided the same day, May 31, 1944) this Court in unanimity affirmed the decree of the District Court to the effect that the escheats statutes of Michigan, including Act 170 of the Public Acts of Michigan for 1941, constitute an unlawful interference with the liquidation of an insolvent national bank . . ." The court's reliance in the instant cause on its former decision was therefore on this unanimous ruling in a former case and it thus (erroneously, as we submit)

held that in this case applying to proven claims the Michigan statute constituted an "unlawful interference with the liquidation of a national bank".

A careful reading of the decision of the Court below will indicate that that Court did not base its holding upon two grounds, as contended by appellee, viz., non-applicability and invalidity. The sole ground was invalidity, in that the Michigan statute was held to interfere with the federal law.

We are faced here with a practical problem, with actuality and not mere verbalism. The Court of Appeals, to be sure, did not use the words of Sec. 1254(2) to the effect that the Michigan statute is invalid as repugnant to the National Bank Law. But it is the same thing to say that the Michigan law is an unlawful interference with the federal law and therefore to refuse to hold that the appellee was bound thereby. We submit that appellee has failed to show how something which does not "apply" can unlawfully interfere with another statute. "Unlawful interference" is a holding of "invalidity" because of "repugnancy". Any other view would permit a Court of Appeals to deprive this Court of appellate jurisdiction when, in fact, holding a state statute invalid because of repugnancy to a federal law, by phrasing the opinion in such way as not to use the exact words of Sec. 1254(2).

III.

The Certiorari Petition

Appellee, in the first part of Division I.A. of his argument, contends that if appeal is denied the alternate petition for certiorari in Docket No. 21 should also be denied. Appellee at this point belittles the importance of this suit and neglects to note its apparent conflict with prior decisions of this Court, in *Anderson National Bank v. Luckett*, 321 U.S. 233, and *U.S. v. Klein*, 303 U.S. 276. This is inconsistent with appellee's contentions in Division I.E. of his argument where he is endeavoring to escape a decision on the important point involved and refers to many other cases where state escheat, if valid, might apply to other funds owed by the United States, and where appellee refers also to the statement in *Connecticut Insurance Co. v. Moore*, 333 U.S. 541, 563, as to the increasing use of escheat laws as sources of state revenue.

Specifically, appellee relies on only two things to indicate that a decision on the merits in the present case would have no general importance. The first is that even though appellant is successful in this case it might have to bring a new suit, not under the present law, but under the new Michigan Code which is alleged to differ from the Michigan law involved at present. Appellee admits that the new code did not terminate the present suit because of the saving clause and does not gainsay the clear principle of law (our original brief, pp. 28-30) that full relief could be given herein. He does mention the fact that a new suit (except for repeal of the law) might be brought under Sec. 9(b) of the law here involved (R.23). However, such a separate suit, as the words of the section show, is merely an alter-

native method which the Attorney General of Michigan "*may*" adopt.

Next, on the assumption that the appellant would not seek full relief in the present proceedings as expressly permitted by the Federal Declaratory Judgment Law, but would institute a new suit under the new Michigan Code of Escheats, appellee endeavors to raise doubts as to whether the new code (Mich. Stat. Ann., Sec. 26.1053) would cover a receiver or other liquidating officer of a national bank. This argument, removed at its outset one step from actuality, is wholly unfounded. Counsel admit that Sec. 5 of the new Michigan Code, in requiring escheat from holders of abandoned property, expressly defines "holder" to include "a bank, either state or federal", "a receiver or other liquidating officer", and "a governmental department, institution, or agency". Appellee's reference to certain special provisions relating to other persons not needed in the case of a bank or its receiver, of course, indicates no retraction of the broad definition. There are no special provisions as to numerous other "holders" embraced in the definition.

No doubt the escheat laws of other states differ in detail from that of Michigan. Each future case will have to depend on its own facts and law. However, this does not mean that the basic question in this case is of small importance. If an escheat law, however worded, may not validly apply to a national bank in liquidation, the states can by no wording of their statutes succeed to proven but abandoned claims against national banks after they are in receivership, although this Court has found no interference of such laws with the National Bank Law in the case of an operating national bank. *Anderson National Bank v. Luckett*, 321 U.S. 233. If this Court holds there is no such unlawful interference, then the states may proceed

with the drafting of valid laws, if by chance some of such laws are not now properly worded.

The second reason asserted against granting certiorari is that since the adoption of the statute for Federal deposit insurance the Federal Deposit Insurance Corporation is the receiver of national banks going into receivership after that law became effective in this regard. 12 U.S.C. 264. It is suggested that this would change the question in the future because of this changed personality of the receiver and because of the right of subrogation given the Corporation to claims of depositors and the specific treatment prescribed with respect to the rights of depositors who fail to claim insured deposits. But this will not render the present issue academic in the future. Subrogation to claims of a depositor in a national bank has previously been upheld. *American Surety Co. v. Bethlehem National Bank*, 314 U.S. 314. Sec. 264 (l) (4) expressly gives the duty to the Corporation "to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed banks, except as herein otherwise provided". The other provisions are merely that the Corporation will retain for its own account moneys released because of its right of subrogation upon having paid insured deposits and that it shall pay the depositors and creditors the amounts available for distribution to them. Thus the Corporation rather than the Comptroller of the Currency now pays dividends. As to specific treatment of depositors who fail to claim insured deposits, Sec. 264(m) (5) provides for a notice to depositors and cuts off depositor's claims within eighteen months "against the Corporation with respect to the insured deposits and against the new bank and such other insured bank with respect to the transferred deposit". However, the statute expressly provides that in spite of the elapse of such period so far as the insurance is concerned "all rights of the depositor against the closed

bank and its shareholders or the receivership estate to which the Corporation may have become subrogated shall thereupon revert to the depositor". Hence the law so far as depositors' claims are concerned against the bank assets and the receivership in no way differs from the law at the present time.

We believe that this Court has jurisdiction over the appeal. However, if we are incorrect, this certainly is a case for decision on certiorari.

IV.

The Michigan Statute Lawfully Applies to National Banks in Liquidation

Much of appellee's brief is devoted to an attempt to avoid, if possible, a decision on the merits, but the meritorious question is discussed in division II at the conclusion of appellee's brief.

Appellee contends that the question involved is not whether the State's ownership of a claim against a bank in liquidation will be respected by Federal officials charged with the liquidation. We respectfully disagree, as it seems to us this is the sole question as the appellee refuses even to give a list of the names and amounts of proven deposits which have been abandoned. Appellee's contention is that the sole question is whether the State or the Comptroller of the Currency will do the distributing of unclaimed funds. This is merely a subsidiary matter. That the appellee knows that the question is whether the State's ownership of the abandoned claim will be respected is indicated by his reference to *Connecticut Insurance Co. v. Moore*, 333 U.S. 563, where it was pointed out that it would be naive to assume that the concern of the states over abandoned

funds reflects only solicitude for the unknown claimants. Of course Michigan desires the unclaimed funds for its primary school fund, although under its statute it must in judicial proceedings advertise for the claimants or their successors and is required to make payment to them at any future time however remote. There is no provision in Federal law for any such advertisement, by judicial proceedings or otherwise.

The weakness of appellee's contention on the merits is indicated by his concession that when a state by operation of its laws of descent succeeds to a depositor's claim against an insolvent national bank, the comptroller must and does honor the claim, and in this connection appellee admits it follows *United States v. Klein*, 303 U.S. 276. Appellee even admits, as compelled to by *Anderson National Bank v. Luckett*, 321 U.S. 233, that the escheat or appropriation by the state of property in fact abandoned or without an owner is as old as the common law itself, and hence the Comptroller would turn the money over to the State if this were an escheat, as in that case. But it is contended that the Michigan escheat law is different from that of Kentucky applied in the *Anderson National Bank* case. Appellee inadequately quotes this Court in the *Anderson National Bank* case by indicating that the Michigan statute would be bad in authorizing the State's taking the accounts into custody solely because of their dormancy. This Court in the *Anderson National Bank* case (page 251) was distinguishing *First National Bank v. California*, 262 U.S. 366, where an escheat law was held invalid because it did not provide for any determination of abandonment in fact; but inasmuch as the Kentucky law considered in the *Anderson National Bank* case provided for later determination of abandonment in fact, this Court held the law valid although "dormancy without more is made the statutory ground for the state's taking inactive bank accounts

into its custody." In fact, the Kentucky law upheld in the *Anderson National Bank* case is precisely like the Michigan law in this regard, this Court holding (p. 241):

> "And it is within the constitutional power of the State to protect the interest of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned."

Hence the appellee fails in distinguishing escheat in the present case from that in the *Anderson National Bank* case, although the appellee would be willing to honor the escheat upheld in that case. Appellee's concession practically ends this case so far as the merits are concerned.

In appellee's admitted submission to the decision in *United States v. Klein*, 303 U.S. 276, he must realize that he is in the same position that the United States was in in that case. As there pointed out, the Government did not claim any right, title or interest to the sum on deposit, but merely claimed that the Pennsylvania escheat law interfered with the right of the United States to distribute the money itself. However, the Court there held that the application of the Pennsylvania law in determining title to the fund was not such an interference. Neither does the Michigan statute bring about such interference with any right of the appellee.

Counsel relies on language in *In re Rapaport's Estate*, 317 Mich 291, *certiorari denied sub nom., California v. Michigan State Board*, 332 U.S. 764. But the Michigan Court (p. 301) did not state without qualification that "escheat is distinct from succession". What it stated was:

> "The term 'escheat' is distinct from succession, *to heirs and next of kin.*" (Italics supplied.)

It also defined the term escheat as it had in the earlier case of *Braun v. McPherson*, 277 Mich. 396, as signifying "a falling of a decedent's estate into the general property of the state on his death intestate and without lawful heirs." To be sure, the Court also quoted (p. 302) from Beale, *Conflict of Laws*, to the effect that the escheat of chattels is not a matter of succession on death, but is rather a right to confiscate property to which there are no other claimants.

But whatever definition is used, the State becomes the successor to the title and is the owner of abandoned property, subject to the rights of the original owners, or their successors, if they can be found. The State of Michigan becomes the owner of the unclaimed proven deposit just as Kentucky did in the *Anderson National Bank* case, and has the right to custody pending appearance of the owner.

This brings us to the real question, viz., whether this right of ownership of Michigan interferes with the National Bank Act system for the operation and liquidation of national banks. If it does, the Court below should be affirmed.

We acknowledge, as we did in our original brief (pp. 42-44), the doctrine of *Davis v. Elmira Savings Bank*, 161 U.S. 275, and other cases now cited by appellee, that state laws are void when they are in express conflict with the National Bank Act and either frustrate the purpose of the national legislation or impair the efficiency of the banks as agencies of the Federal Government. We recognize that the Federal law does provide a system not only for the winding up of the national banks but for their operation, and as so provided, the banks cannot be interfered with. Of course the State of Michigan could not appoint a receiver of a national bank. Of course it cannot control

the disposition of the bank's assets or when dividends will be declared. But this is not being attempted by the Michigan escheat law. The Receiver has disposed of the assets. The Comptroller has declared dividends. Under Sec. 194 of the National Bank Act, the dividends must be paid "on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." The claims of the holders of the deposits now in question have been proved to the satisfaction of the Comptroller or adjudicated in a court of competent jurisdiction. Payment is required on such claims, but not necessarily to the claimant. See our original brief (pp. 37, et seq.). National banks are subject to state laws as a general rule, unless within the exception above mentioned. Appellee does not contest this well established principle, perhaps best expressed in *McClellan v. Chipman*, 164 U.S. 347, See our original brief (pp. 42-43). In fact, appellee admits that national banks are subject to state laws relating, among other things, to the rights of succession to property. This he is compelled to do in light of *Anderson National Bank v. Luckett*, 321 U.S. 233.

The Congress of the United States chose not to provide a method for determining succession to claims. At this point in its provisions for operation and liquidation of national banks it left the matter to state law. Neither the Receiver nor the Comptroller is given any statutory authority to proceed by advertisement, in judicial proceedings or otherwise, to locate abandoned claimants. He does not do so. He admits that he now maintains "perpetual receivers" of defunct banks. The Comptroller's practice as to what to do in the absence of Federal legislation, which is now to maintain perpetual receivers and insist on not turning over the funds to the state as successor to the original claimant, is a relatively new one. Prior to 1937, when the Comptroller determined on his present stand, he

had voluntarily paid dividends to the State of Michigan even on unproven deposits in the very same bank here involved. After his change of practice in 1938 he sought return of the money, but was defeated in this attempt in *Starr v. Schram*, 143 F.2d 561.

This attempted change of ruling has been since litigated and has led to anomalous positions taken in the present case in light of the decisions of this court in *United States v. Klein*, 303 U.S. 276, and *Anderson National Bank v. Luckett*, 321 U.S. 233, handed down since the Comptroller's attempt to establish the new practice.

Thus appellee proudly points out that the Comptroller must and does honor a claim when a state succeeds to a depositor's claim by operation of its law of descent, and in an appendix to his brief copies correspondence with the Michigan Public Administrator of an estate in 1946. There the Public Administrator, even in the face of the refusal of the appellee to render a report of unclaimed deposits, apparently discovered that the particular decedent did have dividends coming to him from the liquidated First National Bank-Detroit, and the Supervising Receiver paid the money to the Administrator without inquiry as to whether the Administrator had caused publication to be made to find heirs of the decedent, or whether the money was going to the State of Michigan. He merely required death certificates. Suppose the decedent in that case had died at sea and no death certificate was obtainable but there was other proof of death which the Supervising Receiver of the bank chose not to consider sufficient? If, as appellee contends, the Receiver or the Comptroller has the sole right to decide who owns the claims, then his contention must go to the extreme that the Public Administrator could not sue to have the right to succession determined. But this would be taking the matter away from the determination of a

court of competent jurisdiction as provided in Section 194 of the Bank Act.

What it comes down to is that the appellee refuses to give to the State of Michigan the names of depositors who have abandoned their proven claims for seven years or more, or the amounts of the deposits. But if by chance Michigan learns of a particular abandoned deposit, then the Comptroller will pay over the dividend if he feels like it.

But state escheat laws like the Michigan law provide an orderly and consistent method. As approved in *Anderson National Bank v. Luckett*, 321 U.S. 233, they require the turning over of an abandoned deposit to the State, as successor to the owner, until by proper court proceedings, or otherwise, the owner or his successor is located.

The anomalous position of the appellee in struggling to avoid the consequences of the decisions of this Court handed down since the Comptroller tried to establish his new policy, is nowhere better shown than where it is stated in his brief that when all efforts on the part of the Comptroller have failed, it is then time enough to determine whether the remaining funds should go to Michigan or to the use of the Federal Government. Appellee does not deny that the Federal Government has no power to escheat the deposits. But the time the appellee hopes for, and until the expiration of which the money may be kept by the Comptroller, will never come. The Comptroller is not required by law to make an effort to locate disappeared claimants or their successors. If he conscientiously desired to locate them he would willingly give a report of the abandoned claims to the State of Michigan, which has a valid procedure to locate them. If by chance the State of Michigan does locate a depositor or his successor, or manages to get a pub-

lic administrator appointed of a deceased depositor who has died without heirs, then the Comptroller is willing to pay. He might also be willing to pay at some time indefinitely remote when somehow it is determined that "all efforts at distribution have failed". They never will have conclusively failed if the Comptroller will not make public the names of claimants and the amounts of claims, and permit Michigan to take custody of the amounts for the claimants, if they can be located, or otherwise for State ownership.

Sixteen years have passed since the first payment of a dividend in First National Bank-Detroit in 1933, and appellee does not deny that he still has more than $300,000.00 (as admitted in the Court of Appeals) available on proven claims since abandoned by claimants.

It is apparent that the Federal law did not attempt to pass upon succession to abandoned claims but left it to state law. It is further apparent that there is nothing in the National Bank Law which the State law interferes with, and that the bank, being defunct anyway, is not interfered with as an instrumentality of the Federal Government. Neither is the Receiver or Comptroller interfered with by being required to perform his ministerial duty of making payment on claims to the lawful successor to the claimant as determined by State law.

Appellee cites no decision of this Court to support his contention, nor does he give any reason why payment to the State as successor to the claimant interferes with the National Bank Law. The court below in the present case gave no reason for its decision other than prior decisions. The only prior decision on the subject was the minority opinion of Judge Simons in *Rushton v. Schram*, 143 F.2d 554, 561, which, as previously pointed out, the court below later unanimously adopted. Judge Simons' decision was

right in the case of unproven accounts, as there the Federal law did cover the subject, and by tontine right (as in bankruptcy and equity) gave the amount which would have been payable on the claims, if proven, to augment proven claims. However, we submit that Judge Simons' decision when now applied to proven claims is erroneous in that the Comptroller must make payment on such claims, pursuant to Sec. 194; and State law, in determining the successor to the claimant, interferes with no provision of the Federal law. Judge Simons did not sit in the present case. (R. 66) With all deference we believe the court below in the present case was in error in following Judge Simons' decision in a case to which it was not applicable.

But appellee claims that even if Michigan is entitled to the abandoned claims it is, nevertheless, defeated because the requirement of a report from a Federal officer, which lies at the threshold of obtaining payment of the claims, is itself blocked by constitutional barriers. In this appellee relies on a 1913 opinion of the then Michigan Attorney General with respect to a different Michigan escheat law and long prior to the decision in *Anderson National Bank v. Luckett*, 321 U.S. 233. The Comptroller did not follow this old Michigan Attorney General's opinion until 1937 in the present case. Messrs. Starr, Rushton, Black and Roth, successive recent Attorney Generals of Michigan, by their action in cases involving First National Bank—Detroit, have long since overruled the old Michigan opinion, and rightly so.

The statute referred to by appellee (12 U.S.C. 484) against the exercise of visitorial powers, applies to the national banks themselves, and only inferentially to their receivers. Nevertheless, in *Anderson National Bank v. Luckett*, 321 U.S. 233, 252, it is stated:

> "Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs."

This Court there relied on *Waite v. Dowley*, 94 U.S. 527, where national banks were required to give lists of stockholders under state law; also upon *Colorado National Bank v. Bedford*, 310 U.S. 41. In *National Bank v. Commonwealth*, 9 Wall. 353, the bank was even made to pay, under state law, the tax levied on bank shares, although the bank itself was not taxable.

The requirement of reports to enable a state to enforce a valid state law is not the exercise of visitorial powers contrary to Federal immunity. The case of *Bank of America, National Trust & Savings Ass'n v. Douglas*, 105 F.2d 100 (C.A.D.C.) cited by appellee at the end of his brief, is one decided in the Court of Appeals for the District of Columbia, with the present Chief Justice participating. In that case it was held that the Securities and Exchange Commission was entitled to bank examiner's reports, the court pointing out (pp. 105-106) that this was not the exercise of visitorial powers contrary to law. This goes far beyond the present case. We are not seeking an accounting of the bank's affairs. We merely desire to know the names and amounts in connection with the deposits abandoned more than seven years, and the payment of such amounts to Michigan as required by its laws. That this is not a visitorial power in violation of the principle of Federal immunity is shown by *Guthrie v. Harkness*, 199 U.S. 148, 158, relied upon by the District of Columbia Court,

and in which stockholders under state law were permitted to make an actual examination of the records of a national bank.

Courts have not taken kindly to attempts by receivers to evade what would have been an obligation of representatives of the bank had it not been for insolvency and the appointment of a receiver. In *Hazen v. Hardee* (C.A.D.C.) 78 F.2d 230, 232, the Receiver of a national bank endeavored to avoid making tax reports for taxation in the District of Columbia. In that case the law applicable to the District required reports from banks, but not expressly from receivers, as in the instant cause. The court stated:

> "The receiver is the 'statutory assignee' of the association and represents both the creditors and the association. Kennedy v. Gibson, 8 Wall. 498, 506 19 L.Ed. 476. As such statutory assignee a duty is imposed on him to administer the estate for the benefit of those who may ultimately establish a right to share in its distribution, and this includes the duty to discharge all obligations of the association imposed by law. To permit the receiver to say that the duty of furnishing the particular return here in question is not imposed because the statute requires it to be filed by named officers of the bank, while at the same time conceding that such named officers, by operation of law, have neither the information, the right, nor opportunity to perform the duty, would be to adopt a strained construction of the act which, in our judgment, is wholly unjustifiable.
>
> "The question, as we view it, is not to be decided by such nice distinctions. It is, after all, a practical question, and, in the circumstances we have related, the refusal of the receiver to furnish the information

> or make the return, whether at his own instance or at the instance of the Comptroller, was arbitrary, tends to embarrass proper administration of the tax statutes of the District, and ought to be condemned. • • •."

Appellee's only reliance to the contrary is upon Judge Simons' opinion in the earlier case of *Rushton v. Schram*, 143 F.2d, 554, 561, where this able Judge did hold that the requiring of reports was an invalid exercise of the power of visitation and inquisition. Even Homer sometimes nods. It is for this reason that Congress has given appellate jurisdiction to the Supreme Court over decisions of our able Courts of Appeal.

We are not here concerned with the imposition of statutory penalties. The Kentucky statute upheld in *Anderson National Bank v. Luckett*, 321 U.S. 233 (Ky. Revised Statutes, 1932, Ch. 393, Secs. 393, 280) likewise imposed penalties, but was not for that reason held invalid. It is to be assumed that the Receiver and Comptroller will obey the decision of this Court if the same is adverse to appellee's contentions. If so, no question of penalties will arise. If it becomes necessary later to assert penalties, that is a case for another day.

The long list of cases of Federal immunity in other situations in the last division of appellee's brief has no bearing here in light of express decisions requiring reports from national banks and their receivers above mentioned.

V.

No Reason for Avoiding Decision on Merits

The appellee must realize the weakness of his case on the merits as he devotes most of his brief to an attempt to avoid such a decision. He has run the gamut of every possible objection which can be imagined. They are not well-founded.

A. *Comptroller Not a Necessary Party.* Appellee has cited no decision in a suit against the receiver of a national bank either to establish an original claim or succession thereto in which it has been held that the Comptroller of the Currency is a necessary party. It has been uniformly held otherwise in a long line of decisions in this Court and other courts (see our original brief, p. 48). Instead, appellee relies primarily on *Williams v. Fanning*, 332 U.S. 490, which did not involve a receiver and the Comptroller, but was a suit to enjoin a postmaster from carrying out an order of the Postmaster General and in which it was held that the Postmaster General was not a necessary party. *Williams v. Fanning*, and other cases relating to non-bank situations have nothing to do with the present case. The Comptroller is required to pay dividends on claims adjudicated by a court of competent jurisdiction. As pointed out in *Earle v. Conway*, 178 U.S. 456, in which there was a claim of succession to a depositor by reason of a writ of garnishment after the receivership and in which the Comptroller was not a party, it is the duty of the Comptroller to comply with the determination of a claim against the receiver. This is merely a ministerial duty of the Comptroller, the receiver having always been considered in all decided cases as the one to be made the party defendant in the assertion of claims or the succession to claims.

In *Merrill v. National Bank of Jacksonville*, 75 Fed. 148, affirmed 173 U.S. 131, the Court of Appeals, in reliance upon other cases in this Court, framed a form of decree whereby the defendant receiver was required to certify to the Comptroller the amount of the claim which it was then assumed the Comptroller would pay as required by law.

What appellee desires is that all suits be brought in the District of Columbia rather than in the Federal courts where the banks are located. He successfully obtained the dismissal of the Comptroller in the present case because he was not a resident of the Eastern District of Michigan. No doubt the appellee could go so far, if his argument were good, as to claim that the Secretary of the Treasury is the only necessary defendant because he has general control and direction over the Comptroller under Sec. 1 of the National Bank Act. See appendix to appellee's brief. But no court has ever construed Sec. 194 of the National Bank Act to require either the Comptroller or the Secretary of the Treasury to be a defendant in a suit against a receiver in a "court of competent jurisdiction".

Appellee contends that the records are not in the hands of the receiver and speaks of three kinds of records, viz.: Those of the bank before receivership, those of the receiver relating to the bank, and those of the Comptroller relating to payment on bank claims. The statute makes no such division into different kinds of books. They all are bank records and the receiver and not the Comptroller, by Sec. 192 of the National Bank Act, is the one who has possession thereof. Furthermore, he did have possession of them at the time of the institution of the present case, including the checks signed by the Comptroller to pay to claimants who had not as yet appeared. This is made clear in the appellee's brief and in the affidavit filed in support of de-

fendant's motion to dismiss in the District Court (R.53-54). To be sure, counsel endeavors to cut the receiver in two by contending that his custody was as a representative of the Comptroller rather than as receiver. But appellee himself in his motion to dismiss denied that he was validly or properly appointed agent or representative of the Comptroller (R.48-49).

The records which were in the receiver's hands at the time of institution of suit were sent to the Comptroller only pursuant to stipulation in this case (R. 38-40) and it is agreed that they are to be returned if the Court directs the same.

Even if the records were in the possession of the Comptroller, it is less to expect him to cooperate with his receiver in making reports therefrom than it is to expect him to comply with judgments against the receiver, as all decisions on the subject have held he must do.

Appellee seeks to avoid the apparent inconsistency of having obtained the dismissal of the Comptroller as an unnecessary party in an earlier case (see our original brief, pp. 47-48) on the claim that the present receivership is closed. He likewise seeks to distinguish the many decisions holding that the Comptroller is not a necessary party by pointing out that in such cases the receiverships were not closed, although this Court and other courts considering the cases made no distinction on this account.

But the receivership in the present case is not closed. Appellant in his petition below averred that defendant herein at the time of institution of the suit was the present receiver of the bank (R. 3, 5). Defendant's motion to dismiss of course admitted this well-pleaded fact. Appellee appeared as receiver, filed a motion to dismiss as receiver

and signed a stipulation as receiver, as we pointed out in our original brief.

But appellee now claims that he was not a real receiver in that an affidavit was filed in support of the motion to dismiss (R. 49-54) in which it was asserted that on June 15, 1944, when final accounting of a predecessor receiver was approved, the receivership was "deemed technically closed" (R. 53). But the only statutory occasion for the closing of the receivership is when there is a surplus of moneys to be turned over to an agent for stockholders. See *United States v. Weitzel*, 246 U.S. 533. The appellee can point to no statutory right to "deem" receivership closed. Even in the affidavit it is admitted that the appellee Connolly was given a commission as receiver to act in incidental cases that might require action by a receiver. Appellee's brief admits that the Comptroller keeps permanent receivers of all defunct national banks. He has a supervising receiver who continues to pay checks on claims with respect to the national bank involved in the instant cause after the time the receivership is alleged to have been closed.

If the affidavit filed with the motion to dismiss in the District Court could be taken, as it cannot be, as a denial of the continued existence of the receivership it would not be permissible under Rule 12(b)(6) of the Federal Rules of Civil Procedure in effect at the time the motion was made. This rule of course requires defenses, with certain exceptions, to be asserted in a responsive pleading instead of in a motion to dismiss. While affidavits, or so-called "speaking motions", have been allowed on some jurisdictional matters and the like, or in elaboration of facts, they are not allowed in denial of facts averred in the plaintiff's complaint. *Gallup v. Caldwell*, 120 F. 2d 90 (CCA3);

Farrell v. District of Columbia Amateur Athletic Union, 153 F. 2d 647 (C.A.D.C.).

But appellee relies also on the fact that the Comptroller in a report to Congress said that this receivership was closed although Connolly was still receiver and the Comptroller maintains perpetual receivers. What was meant by "closed" was of course merely that the assets of the bank had been disposed of and the net amount remaining declared as dividends. Certainly the Comptroller's reports to Congress about banks' being finally "closed" are not very "final" since it appears in the same table 45 of the Comptroller's self-serving 82nd Annual Report to Congress for the year 1944, at page 169, that another receivership, that of the First National Bank of Lumberton, Mississippi, was during 1944 reopened.

What the contention comes down to is this: The Comptroller is a necessary party in suits against receivers on claims even though he had a receiver in office, provided the Comptroller has reported to Congress that the receivership is deemed to be closed. If, however, he later reports that it is deemed to be reopened, then he becomes an unnecessary party. Certainly the whim of the Comptroller cannot thus be allowed to decide when and against whom a court of competent jurisdiction may adjudicate a claim under Sec. 194.

At the time a final dividend is declared, of course, all of the bank assets will have been disposed of except the cash necessary to pay the final dividend. If a receivership may be deemed closed before this cash is paid out then indeed there is a simple way to defeat suits against receivers to collect claims. Thus "closing" would occur long before the end of the seven-year period of presumptive abandon-

ment. Even a claimant himself, if the Comptroller did not choose to pay, would have to go to Washington and sue the Comptroller and the Secretary of the Treasury there, even though he brought suit promptly after the declaration of the final dividend but unfortunately after the Comptroller had deemed the receivership closed.

It is late to overrule the numerous decisions of this Court holding that the Comptroller is not a necessary party, and especially so as this may be the last case where the question could possibly be raised. Now that the Federal Deposit Insurance Corporation is the receiver of national banks, the statute directly requires it and not the Comptroller to pay the dividends. 12 U.S.C. 264 (l) (4).

B. *Not a Suit Against the United States.* We do not deny that the receiver is an agent of the Federal Government. The national bank itself has its valid existence solely because it also is an agent of the Government. This has never been held to mean that suits cannot be brought against the bank or its receiver, any more than that suits cannot be brought against the receiver because he acts under the direction of the Comptroller.

Appellee relies on *Auten v. United States National Bank*, 174 U.S. 125, which of course allowed a claim in a suit against a receiver although he was held to be an agent of the United States. *Roth v. Hood*, 106 F. 2d 616 (CCA6), also relied upon by the appellee, entertained a claim against a receiver for specific property although the claim was denied on the merits. The claim was allowed in a suit against the receiver of a national bank in *Chemical National Bank v. Armstrong*, 59 Fed. 372 (CCA6), aff'd, 176 U.S. 618, upon which case appellee relies. Such cases are of course legion.

In the *Chemical National Bank* case it was pointed out that the appointment of the receiver transferred the bank assets to the receiver and the Comptroller in trust to apply the same in ratable distribution to the creditors.

O'Connor v. Rhodes, 79 F. 2d 146 (C.A.D.C.), relied upon by appellee, sustained among other things a suit by a bank receiver against the Attorney General of the United States who as alien property custodian obtained funds from the bank receiver. It was held that no interest of the United States was involved as the money of the alien property custodian was earmarked for a special purpose. Here the bank funds are held by the receiver or Comptroller solely for the special purpose of paying claims. The United States has no interest therein and claims none. *Richmond F. & P.R. Co. v. McCarl*, 62 F. 2d 203 (C.A.D.C.), cert. denied, 288 U.S. 615, likewise relied upon by appellee was one where it was held that the United States was not a necessary party where an injunction was sought to force the Comptroller General not to withhold money due plaintiff. Here money is due on claims by the express provision of Sec. 194 of the National Bank Act.

In *Haskins Bros. & Co. v. Morganthau*, 85 F. 2d 677 (C.A.D.C.), cert. denied, 295 U.S. 588, it is pointed out that the United States is not involved as a necessary party when the performance of a ministerial duty by an officer of the Government is required.

This is not a difficult case like *Larson v. Commerce Corp.*, 337 U.S. 682, cited by appellee. This is not a suit to obtain specific real property or chattels which Government officers are holding as United States property. The United States claims no property right. The Comptroller and his receiver are under an express statutory duty to pay claims out of the bank funds on hand. Even if the *Larson* case had any

applicability here, the Government officer is acting outside of his legal authority in refusing payment on claims as required by Sec. 194 of the Act.

If by any chance the United States were in effect a party, Congress has consented to such suit by making the Comptroller pay claims established by a court of competent jurisdiction. There is no distinction made by the statute between the original proof of the claim and proof of its transfer by operation of law or otherwise. If there were, then the cases we have cited allowing garnishment, subrogation and similar claims against national banks or receivers thereof would have been dismissed as suits against the United States, if appellee's contentions were valid.

The claim that escheat is not a succession to the claim of a prior owner is a play upon words. One who obtains garnishment, one who obtains right of subrogation, one who succeeds as administrator or the state which obtains by escheat are all successors and no one is making a claim against the United States when by suit against the bank itself or its receiver he endeavors to establish right to receive payment on the claim which the Federal statute requires be paid.

C. *Res Adjudicata.* It is timidly suggested as a reason for avoiding decision on the merits that prior decisions in the Sixth Circuit "may" render the case *res adjudicata.*

Res adjudicata was not pleaded nor urged until the case reached this Court.

We concur in the rule of *Cromwell v. County of Sac,* 94 U.S. 351, 352, that a prior judgment concludes parties and those in privity "not only as to every matter which was offered and received to sustain or defeat the claim or de-

mend, but as to any other admissible matter which might have been offered for that purpose." But the claim or demand in the three earlier cases was solely for Michigan to receive deposits in the bank where the claimant had failed to file claim with the Receiver. Appellee states that the prayers in the earlier cases were like the prayers in the present case, in that the plaintiffs sought a ruling that the receiver was bound by the Michigan statute. But the claims asserted and with respect to which it was alleged the receiver was bound were as to unproven deposits. This appears on the record in the petitions for *certiorari*, numbers 731 and 732, October term, 1941, filed in this Court in *Starr v. Schram*, with respect to which petitions this Court denied *certiorari* in 314 U.S. 695. In the record, at page 5 in this first suit, the fact averment as to the claim is stated as follows:

> "That your petitioner is informed and verily believes that the records of the defendant disclose that there are approximately one hundred twenty-five thousand one hundred six (125,106) individual deposit balances, totalling Two Million Thirty-eight Thousand Two Hundred Seventy-one Dollars and Forty-eight cents ($2,038,271.48), which appeared as liabilities upon the books of the First National Bank-Detroit as of its suspension on the 11th day of February, A.D. 1933, upon which no claims have been presented or filed with said Receiver or his predecessor, or upon which balances no demands have been made for payment by the persons who made such deposits, prior to the date hereof."

That this was the issue appears also in *Starr v. O'Connor*, 118 F.2d, 548, 550.

In fact, in 1938 when this prior case was started, the State could not have sought escheat under its statutes with

respect to proven claims. The receivership did not start until 1933, and seven years had not as yet elapsed within which a depositor who had proved his claim could be presumed to have abandoned it.

Starr v. Schram, 143 F.2d 561, was in substance a second hearing of the original case, the Receiver having filed an additional petition seeking to obtain the return from the State of dividends on unproven deposits which the Receiver had under the prior policy of the Comptroller voluntarily paid to the State of Michigan.

The third former suit, *Rushton v. Schram*, 143 F.2d 554, contained the same fact averments as to the State claim as the earlier cases, viz., claim was made as to unproven deposits and not to proven deposits as at present. While the record in this case is not on file with this Court, the averments in the case are set forth as an appendix to our reply brief in support of petition for *certiorari* in Docket Number 21 (Docket Number 553, October Term, 1948). While we are thus going outside the record of this case, it is appellee who now asserts *res adjudicata* and he should have brought up the pertinent part of the record in the prior case to substantiate his claim made in this Court for the first time. However, we do not need to look at the record in the prior cases because in the present case the court below made it clear (R. 68) that the prior cases involved this entirely different claim. It there described the present case as one relating to the application of Michigan's escheat laws to deposits where depositors have had their claims allowed and have since disappeared, and the court stated:

> "The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

While we believe that the "settled doctrine" did not apply to the present case, it is clear from the above wording that the prior cases were on different claims from the present one, and hence in the prior cases no "admissible matter" might have been "offered" to sustain or defeat the present claim.

In *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 282, the prior decision was said to be on the "precise point".

D. *A State Decision Interpreting the Law is Neither Necessary Nor Possible.* Reliance is placed on *Federation of Labor v. McAdory*, 325 U.S. 450; *A.F. of L. v. Watson*, 327 U.S. 582; *Spector v. McLaughlin*, 323 U.S. 101, and other cases, with a view to postponing a decision here until the Michigan court has passed on the interpretation of its escheat law. In those cases an appropriate state proceeding was immediately available, and there were questions of state law which were "seriously doubtful".

However, the recent decision in *Propper v. Clark*, 337 U.S. 472, makes it clear that it is in the unusual case where this Court does not decide questions presented to it but delays the case in a lower court until a state court decision may be had. As there pointed out (p. 492), such procedure "is not to be used to impede the normal course of action where Federal courts have been granted jurisdiction of the controversy". While Justice Frankfurter dissented, it was solely because there was a seriously doubtful question of state law and a practical way to retain jurisdiction pending prompt state decision, and an unconscionable amount of time had not been used.

If we apply the reasoning of either the majority or dissenting opinions in the *Propper* case, it is clear that this is not a case for such delay.

Appellee's suggestion of a new suit to obtain a decision as to the meaning of the present statute is directly contrary to what he has himself pointed out in division I-A of his argument in referring to the pending *certiarori* petition. The Michigan statute involved in this case has been repealed. While the repealing law had a saving clause permitting the continuance of the present case, and full relief can be granted herein, a new case now started in a Michigan court would have to be on the new Michigan code, and hence could not interpret the repealed code. Appellee is thus hoist by his own petard.

Even if a decision on the interpretation of the law involved in this case were now possible of attainment in the Michigan courts, there is no Receiver now in Michigan upon whom to obtain service, and if there were, the Receiver would of course exercise his right to remove to Federal court. Furthermore, it would be asserted, as it is in the present case (erroneously, to be sure,) that the Comptroller is a necessary defendant; he would obtain dismissal for want of service upon him in Michigan, similarly to what he did in the present case. Hence, if appellee's claim were well founded, the case would have to be brought in the District Court of Columbia, and that Court and not the Michigan court would be interpreting Michigan law rather than the Court of Appeals for the Sixth Circuit, which is familiar with Michigan law because of the many cases involving such law there decided.

Judge McAllister, who participated in the decision of the present case, has long been a resident and lawyer of Michigan and is a former Supreme Court Justice of that State. This is like *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708, where this Court stated:

"The questioned ruling was made by three judges

> who were constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. • • • • • Under the circumstances we will follow our general policy and leave undisturbed this Court of Appeals' holding on a question of state law."

This was true although this Court believed that reasonable arguments based on Illinois cases could be made to support either side of the question involved.

In the instant cause the court below found no difficulty in interpreting the Michigan escheat law. They were not impressed by tenuous arguments as to the non-applicability of that law to receivers of national banks. As we have pointed out, the court below found the Michigan law applicable, but held it invalid as "an unlawful interference with the liquidation of a national bank".

While of course the Court should avoid determining a constitutional question if a case can be properly decided on other grounds, there is no constitutional question in the present case. All admit that the National Bank Act is supreme in the field it covers and that national banks cannot be validly interfered with by state laws. The problem presented is: does the Michigan law invalidly interfere with the National Bank Act in the circumstances of this case?

In addition, it is apparent that the suggestions as to inapplicability of the Michigan statute to nationl banks in liquidation and the receivers thereof are not well founded and would be dismissed by any court in the State of Michigan or elsewhere.

Counsel refer to Sec. 4(b) of the Michigan Law (R. 17) where persons subject to the Act are defined. By use of

italics (the Michigan Legislature was content with roman type) an attempt is made to extend an exception of municipal corporations and officers thereof so as to have it cover also governmental departments, agencies and officials. If italics are to be inserted, a correct insertion would show the definition of "person" or "persons" to include:

> "a natural person, a copartnership, a company, a corporation, *except municipal corporations, or any officer thereof,* any government department, agency, instrumentality or official, a depository, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural persons."

It is apparent that the exception qualifies the word "corporation" and nothing else, in that municipal corporations or any officer thereof are excepted.

That it was not the intent to except government departments, agencies or officers, such as receivers of national banks, is made doubly clear by the fact that even appellee does not contend that the exception clause excludes depositories, receivers, custodians, and liquidating officers.

The asserted strained construction is not only unnatural, but unthinkable as having been intended by the Michigan Legislature. Of course exceptions in statutes are strictly construed. *Spokane & Inland R.R. v. U.S.*, 241 U.S. 344, 350; *Peidmont & Northern Ry v. Commission*, 286 U.S. 299, 311; *U.S. v. Scharton*, 285 U.S. 518, 521; and *United States v. McElvain*, 272 U.S. 633, 639.

Neither does the provision in the Michigan statute for signature by natural persons, partnerships, corporations and others, without mentioning government agencies or officials (Sec. 6, R. 18, 19) lead to any supposed exclusion

of receivers. The receiver is a natural person. If Federal Deposit Insurance Corporation were the receiver, it is a corporation.

Neither is anything gained by reference to Sec. 4(b) (R. 17) where a "depository" is defined to include any person who is indebted or accountable to any other person as depositor. Sec. 6 (R. 18) requires a report from a depository who is indebted or accountable to any other person.

The Receiver is not accountable solely to the Comptroller. The numerous cases we have previously cited where judgments have been rendered against receivers on claims of depositors or their successors show that the receiver is held accountable to depositors and their successor as well.

In fact, if the law defined "person" and "depository" so as to include only banks themselves and bank officers, nevertheless the receiver, as statutory assignee of the bank, would have to file reports. See *Hazen v. Hardee*, 78 F.2d 230, 232 (C.A.D.C.) previously quoted from.

In light of the tenuous character of any possible proposed interpretation of the Michigan law so as not to include receivers of national banks, the court below found the statute applicable, but as such invalid as repugnant to the National Bank Law.

Conclusion

The State of Michigan desires a decision on the merits and submits that that decision should reverse the Court of Appeals and should not be diverted by unsound attempts of the appellee to avoid it.

Respectfully submitted,

STEPHEN J. ROTH
Attorney General of Michigan

EDMUND E. SHEPHERD
Solicitor General of Michigan

ARCHIE C. FRASER
Assistant Attorney General of Michigan

State Capitol,
Lansing 2, Michigan

JULIUS H. AMBERG
Special Assistant Attorney General of Michigan
500 Michigan Trust Building
Grand Rapids 2, Michigan

Counsel for Appellant